Part 1

[**Source**: *South African Law Reports*, vol. 3, 1988, pp. 51-67]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

S v. PETANE

CAPE PROVINCIAL DIVISION

[...]

Postea (November 3 [1987]).

Conradie J: The accused has been indicted before this Court on three counts of terrorism, that is to say, contraventions of s 54(1) of the Internal Security Act 74 of 1982. He has also been indicted on three counts of attempted murder. [...]

When [...] the accused was called upon to plead he refused to do so. A plea of not guilty on each count was accordingly entered [...].

The accused's position is stated to be that this Court has no jurisdiction to try him.

I then heard argument on what was submitted to be a jurisdictional question. As the argument progressed I began to doubt whether the point which was being raised was really a jurisdictional point at all. The point in its early formulation was this. By the terms of Protocol I to the Geneva Conventions the accused was entitled to be treated as a prisoner-of-war. A prisoner-of-war is entitled to have notice of an impending prosecution for

an alleged offence given to the so-called ‘protecting power’ appointed to watch over prisoners-of-war. Since, if such a notice were necessary, the trial could not proceed without it, Mr Donen suggested that the necessity or otherwise for giving such a notice should be determined before evidence was led. [...]

Articles 45(1) and (2) of Protocol I contain the following provisions:

1. ‘A person who takes part in hostilities and falls in the power of an adverse Party shall be presumed to be a prisoner of war and therefore shall be protected by the Third Convention if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence.’

It is not necessary to quote the remainder of para 2 of art 45.

If the terms of the Protocol were found to apply I would be bound by these provisions and failure to give effect thereto might amount to an irregularity. I say ‘might’ amount to an irregularity because the article, to my mind, clearly envisages a situation where the applicability of the Protocol is conceded and the only question before the Court is the entitlement to protection of an individual captive.

The issue raised by such a plea is, in my view, not a jurisdictional issue. A captive who raises such a defence avers that, because he fought a war as a soldier in accordance with the laws of war, he is not guilty of any crime, despite having deliberately killed or injured others or damaged their property. In *R v Guiseppe and Others* 1942 TPD 139, Malan J set aside the conviction of Italian prisoners-of-war on the ground that the convictions, without notice to the protecting power, had been irregular. He did not hold that the court, in that case a magistrate’s court, had no jurisdiction to try the offenders. The case is not authority for the proposition that the accused’s acts are not justiciable before a municipal tribunal. Indeed, art 45(1) of Protocol I envisages that the status of such a prisoner should be determined by a competent municipal tribunal. [...]

On 12 August 1949 there were concluded at Geneva in Switzerland four treaties known as the Geneva Conventions. The only one of these Conventions which concerns me today is the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.

Part 2

South Africa was among the nations which concluded the treaties. According to the *International Review of the Red Cross* (January/February 1987 No 256), 165 countries were as at 31 December 1986 parties to the Geneva Conventions. This must be very nearly all the countries in the world. It is fair to state that the terms of these Conventions enjoy universal recognition. One of these terms is, of course, that which describes their field of application. Except for the common art 3, [...] they apply to wars between States.

After the Second World War many conflicts arose which could not be characterised as international. It was therefore considered desirable by some States to extend and augment the provisions of the Geneva Conventions so as to afford protection to victims of and combatants in conflicts which fell outside the ambit of these Conventions. The result of these endeavours was Protocol I and Protocol II to the Geneva Conventions, both of which came into force on 7 December 1978.

Protocol II relates to the protection of victims of non-international armed conflicts. Since the state of affairs which exists in South Africa has by Protocol I been characterised as an international armed conflict, Protocol II does not concern me at all. [...]

Article 2 common to all the Geneva Conventions provides, *inter alia*, that:

‘The present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State of war is not recognized by one of them.’

Article 1(4) of Protocol I amplifies and extends common art. 2 by providing that:

‘The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.’

The extension of the scope of art 2 of the Geneva Conventions was, at the time of its adoption, controversial. According to Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts* (1982), the debate about this article took up almost the whole of the first session.

The article has remained controversial. More debate has raged about its field of operation than about any other articles in Protocol I. It has been criticised for having introduced political objectives into humanitarian law, thus making it very difficult for any State to concede its applicability; and it has been criticised for the vagueness of its terminology. (See Andrew Borrowdale “The Law of War in Southern Africa: The Growing

Debate" XV Cilsa 1982 at 41.) So, although practically every State in the world has agreed that the principles of the Geneva Conventions should apply to conventional international armed conflicts, far fewer (as I shall show) were or are satisfied with the extension of these provisions to the new conflicts characterised as 'international'.

South Africa is one of the countries which has not acceded to Protocol I. Nevertheless, I am asked to decide, [...] as a preliminary point, whether Protocol I has become part of customary international law. If so, it is argued that it would have been incorporated into South African law. If it has been so incorporated it would have to be proved by one or other of the parties that the turmoil which existed at the time when the accused is alleged to have committed his offences was such that it could properly be described as an 'armed conflict' conducted by 'peoples' against a 'racist régime' in the exercise of their 'right of self- determination'. Once all this has been shown it would have to be demonstrated to the Court that the accused conducted himself in such a manner as to become entitled to the benefits conferred by Protocol I on combatants, for example that, broadly speaking, he had, while he was launching an attack, distinguished himself from civilians and had not attacked civilian targets. [...]

[T]he Appellate Division accepted that customary international law was, subject to its not being in conflict with any statutory or common municipal law, directly operative in the national sphere. The Appellate Division described the attributes of a rule of customary international law which would make it applicable in South Africa. It would have to be either universally recognised or it would have to have received the assent of this country. In holding this, the Court referred to a passage in Oppenheim *International Law* 8th ed vol 1 at 39 which States the conditions concerning universal acceptance or State assent for recognition of a rule of customary international law as part of the law of England. Our law and English law in this respect is therefore the same.

[...] International law does not require universal acceptance for a usage of States to become a custom.

[...] I am prepared to accept that where a rule of customary international law is recognised as such by international law it will be so recognised by our law. [...]

Custom is usage which is considered by States to be legally binding:

'All that theory can say is this: Whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law.'

(Oppenheim (op. cit. vol 1 at 27).) The conduct of States is referred to as State practice. The view that such conduct is legally right or obligatory is called the *opinio juris*.

G J H van Hoof *Rethinking the Sources of International Law* (1983) is one of the many writers on

international law who supports this two-element approach. He says at 93 that it

'buttresses the practice-oriented character of international custom by demanding that the formulation of the content of the rule in stage one takes place through usus: customary law is built upon repetition. Without the repetition of similar conduct in similar situations there can be no custom, and without custom there can be no customary law. It is therefore a reminder of the fact, sometimes overlooked, that although *opinio juris* turns a rule into a rule of international law, it is the usus which makes it a rule of customary law'. [...]

There are writers who espouse the view that State practice alone is sufficient to create a rule of customary international law, and others who believe that the *opinio juris* alone is sufficient. [...]

I am prepared to accept that, as might happen in rapidly developing fields of technical or scientific endeavour, like space exploration, if all the States involved share an understanding that a particular rule should govern their conduct, such a rule may be created with little or no practice to support it. Indeed, the opportunity for putting the understanding into practice may not arise. It may be, as *Van Hoof (op. cit.)* suggests at 86, that it would be better to regard customary international law so created as not emanating from custom but from a new and different source.

I am also prepared to accept that customary international law may in this way be created very quickly, but before it will be considered by our municipal law as being incorporated into South African law the custom, whether created by usus and opinio juris or only by the latter, would at the very least have to be widely accepted.

Mr Donen says that by near-universal State practice the provisions of Protocol I have passed into customary international law which, since it is part of South African law, obliges this Court to apply the provisions thereof. He argues that the State practice which has made the provisions of the first Protocol part of customary international law is the attitude of States, practically all the States of the world, expressed in frequent condemnation of the policies of this country at the United Nations. There are, to my mind, several difficulties with this proposition.

In the first place, it is doubtful whether resolutions passed by the United Nations General Assembly qualify as State practice at all. There is, says *Van Hoof (op. cit. at 108)*, no unanimity on what is to be considered State practice [...]. *Akehurst's* detailed study on custom shows that it is far from easy to indicate *in abstracto* whether a certain type of act can be taken to belong to usus or not. *Akehurst* himself employs an extremely broad concept of usus. Almost all activities of States are counted. Illustrative in this respect is his opinion on statements by States *in abstracto*:

'It is impossible to study modern international law without taking account of declaratory resolutions and other statements made by States *in abstracto* concerning the content of international law.'

This statement as such is certainly correct. It does not follow, however, that such resolutions or declarations can be classified as *usus* giving rise to custom. They may constitute *opinio juris* which, if expressed with respect to a rule sufficiently delineated through *usus*, may create a customary rule of international law. To this extent *Akehurst* is correct in stating that

‘(w)hen States declare that something is customary law it is artificial to classify such a declaration as about something other than customary law’.

But, if there is no preceding *usus*, such a declaration cannot give birth to a customary rule, unless, of course, the declaration itself is treated as *usus* at the same time. However, it takes too wide a stretching of the concept of *usus* to arrive at the latter conclusion. As was rightly observed, ‘repeated announcements at best develop the custom or usage of making such pronouncements’.

Part 3

As was already reiterated in the foregoing, it is dangerous to denaturate the practice-oriented character of customary law by making it comprise methods of law-making which are not practice-based at all. This undermines the certainty and clarity which the sources of international law have to provide. The Universal Declaration on Human Rights may be taken as an example in this respect. It has been asserted that in the course of time its provisions have grown into rules of customary international law. This view is often substantiated by citing abstract statements by States supporting the Declaration or references to the Declaration in subsequent resolutions or treaties. Sometimes it is pointed out that its provisions have been incorporated in national constitutions. But what if States making statements like these or drawing up their constitutions in conformity with the Universal Declaration at the same time treat their nationals in a manner which constitutes a flagrant violation of its very provisions, for instance, by not combatting large-scale disappearances, by practicing torture or by imprisoning people for long periods of time without a fair trial? Even if abstract statements or formal provisions in a constitution are considered a State practice, they have at any rate to be weighed against concrete acts like the ones mentioned.

In the present author’s view, the best position would seem to be that it is solely the material, concrete and/or specific acts of States which are relevant as *usus*. As was said, it is difficult to come up with a definition *in abstracto*, but the following description would seem to offer a useful handhold:

‘The substance of the practice required is that States have done, or abstained from doing, certain things in the international field [...]. State practice, as the material element in the formulation of custom, is, it is worth emphasizing, material: it is composed of acts by States with regard to a particular person, ship, defined area of territory, each of which amounts to the assertion or repudiation of a claim relating to a particular apple of discord.’

It is, I believe, correct to say that the practice of condemnation of South Africa is evidence only of a general

dislike of its internal policies. There is nothing in the condemnation from which the content of a rule of customary international law may be derived. I fail completely to appreciate how the condemnation of South Africa, or even the labelling of apartheid as a crime against humanity, leads to the inference that Protocol I has been accepted as part of customary international law by those States uttering those condemnations. I suppose that, since ratification of Protocol I is open to every State, very little short of that could be construed as an acceptance of its provisions.

In particular, United Nations resolutions cannot be said to be evidence of State practice if they relate, not to what the resolving States take it upon themselves to do, but to what they prescribe for others. Customary international law is founded on practice, not on preaching.

Indeed, Amato *[sic]*, *The Concept of Customary International Law* (Cornell University Press 1971) puts forward the view that not even claims put forward by States can be considered as State practice. The State must act.

‘What is an “act” of State? In most cases a State’s action is easily recognised. A State sends up an artificial satellite, tests nuclear weapons, receives ambassadors, levies customs duties, expels an alien, captures a pirate vessel, sets up a drilling rig in the continental shelf, visits and searches a neutral ship and similarly engages in thousands of acts through its citizens and agents. On the other hand, a claim is not an act. As a matter of daily practice, international law is largely concerned with conflicting international claims. But the claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom, for a State has not done anything when it makes a claim; until it takes enforcement action the claim has little value as a prediction of what the State will actually do.’

MacGibbon (in Bin Cheng (ed.) *International Law Teaching Practice*) in a chapter entitled ‘Means for the Identification of International Law’ and subtitled ‘General Assembly Resolutions: Custom Practice and Mistaken Identity’, concludes that General Assembly resolutions can neither create new customary international law, nor be evidence of State practice [...].

Nor, in the view of *MacGibbon*, a view of which the logic seems inescapable, can a General Assembly resolution constitute the required opinio juris to create custom:

‘If the existence of the *opinio juris* is in question, what is sought is evidence of what the Court in the *North Sea Continental Shelf* cases described as a general recognition that a rule of law or legal obligation is involved. To focus that search exclusively on a General Assembly resolution is bound to prove profitless because such an instrument of an essentially recommendatory character is incapable of exhibiting such an attribute. Again, the issue turns on the answer to the question posed earlier: what are States voting for when they vote in favour of a resolution? And, as before, the answer can only be: they are voting for what they know to be merely a recommendation. It is axiomatic that such a vote cannot convey the sense of legal obligation essential to an expression of the *opinio juris*. [...]’

(*MacGibbon (op. cit.* at 23).)

The same point is also well made by Thirlway *International Customary Law and Codification*, who writes at 58:

“The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of State practice; but it may be adduced as evidence of the acceptance by the State against which it is sought to set up a claim, of the customary rule which is alleged to exist, assuming that the State asserts that it is not bound by the alleged rule. More important, such assertions can be relied on as supplementary evidence, both of State practice and of the existence of the *opinio juris*; but only as supplementary evidence, and not as one element to be included in the summing up of State practice for the purpose of assessing its generality.

[...] The only apparent exception to this principle – which is not really an exception – is the act of a State in ratifying or acceding to a multilateral treaty which directly or indirectly asserts the existence, at least for the future and for the States party to the treaty, of a rule of law. Just as a series of bilateral treaties concluded over a period of time by various States, all consistently adopting the same solution to the same problem of the relationships between them, may give rise to a new rule of customary international law, so the general ratification of a treaty laying down general rules to govern the future relationships of States in a given field has a similar effect. The practice here is concrete in the sense that each State does not merely assert the desirability, or even the existence, of the rule of law in question, but by a definite and formal decision accepts the rule for the regulation of its own interests in future differences in the field covered by the treaty. For this reason it is possible, as the International Court of Justice stated in the *North Sea Continental Shelf cases*, for a custom to arise simply from the general (but not universal) ratification of a codifying treaty.”

Part 4

To my way of thinking, the trouble with the first Protocol giving rise to State practice is that its terms have not been capable of being observed by all that many States. At the end of 1977 when the treaty first lay open for ratification there were few States which were involved in colonial domination or the occupation of other States and there were only two, South Africa and Israel, which were considered to fall within the third category of racist régimes. Accordingly, the situation sought to be regulated by the first Protocol was one faced by few countries; too few countries, in my view, to permit any general usage in dealing with armed conflicts of the kind envisaged by the Protocol to develop. [...]

Mr Donen contended that the provisions of multilateral treaties can become customary international law under certain circumstances. I accept that this is so. There seems in principle to be no reason why treaty rules cannot acquire wider application than among the parties to the treaty.

Brownlie *Principles of International Law* 3rd ed. at 13 agrees that non-parties to a treaty may by their conduct

accept the provisions of a multilateral convention as representing general international law. *Van Hoof (op. cit.)* writes at 109:

"Most writers agree that treaties are to be considered State practice which may generate customary rules of international law. They may find support in the ICJ's statement in the *North Sea Continental Shelf* case, holding that: "There is no doubt that this process is a perfectly possible one and does from time to time occur. It constitutes indeed one of the recognised methods by which new rules of customary international law may be formed."

It is true that treaties may be considered *usus*, but a number of things should be kept in mind in this respect. First, the treaty concerned must be concrete or specific enough to be able to delineate the content of a customary rule. Furthermore, and this is more important here, a treaty is, of course, binding on the States parties to it. Consequently, the question of its being capable of generating a customary rule is relevant only with respect to States which are not parties to it. For a customary rule of international law to come into being for non-parties, the latter must express their *opinio juris* with respect to it. One should be careful, however, to draw the conclusion that they indeed have done so. [...] Similarly, it would seem that in the case of a multilateral treaty which is open for ratification by all states, the *opinio juris* constituting the "accession by way of custom" has to be unambiguous. The fact that a State is not prepared to ratify the treaty cannot be without significance in such a situation."

I incline to the view that non-ratification of a treaty is strong evidence of non-acceptance.

Starke (op. cit.) remarks at 43:

'The mere fact that there are [sic] a large number of parties to a multilateral convention does not mean that its provisions are of the nature of international law binding non-parties. Generally speaking, non-parties must by their conduct distinctly evidence an intention to accept such provisions as general rules of international law. This is shown by the decision of the International Court of Justice in 1969 in the *North Sea Continental Shelf* cases, holding on the facts that art. 6 of the Geneva Convention of 1958 on the Continental Shelf, laying down the equidistance rule of apportionment of a common continental shelf, had not been subsequently accepted by the German Federal Republic – a non-party – in the necessary manifest manner.'

Suppose for the moment that Protocol I had been enthusiastically embraced by the world community, and suppose that it was good law to say that its terms bound South Africa in spite of its non-assent, what we would then have is a situation in which neither party which is engaged in what has been called the 'armed conflict' in South Africa has accepted Protocol I. I shall explain.

The one party to what the accused's counsel characterised as the 'armed conflict' is the South African State. The other party is said to be the ANC through its military wing, Umkhonto We Siswe, of which the accused

has been admitted to be a member.

It was suggested by defence counsel that the ANC acceded to the Protocol, as it would have been entitled to do in terms of art. 96. However, this suggestion is open to serious doubt. In his article entitled 'The Law of War in South Africa-The Growing Debate', referred to earlier, *Andrew Borrowdale* writes at 41:

'On 20 October 1980 Oliver Tambo, President of the African National Congress of South Africa (ANC), handed to the President of the Red Cross the following declaration signed by himself:

"The African National Congress of South Africa hereby declares that it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts.

Wherever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol I relating to the protection of victims of international armed conflicts." [...]'

Borrowdale comes to the conclusion, however, that the ANC declaration

'would not seem to have been made in the context of art 96(3). In the first place, it does not appear to have been addressed to, or deposited with, the depository referred to in art 96(3), viz the Swiss Federal Council. Secondly, the ANC has not undertaken to apply the rules of the Geneva Conventions of 1949 and the additional Protocol I of 1977 unconditionally, but merely to respect them whenever practically possible. [...]'

[...]

Nevertheless, despite the refusal of each party to the 'conflict' to bind itself to the Protocol, *Mr Donen* contends that the Protocol binds them both. This proposition is far-reaching. What one has here are two parties, one of which is not a State, which are agreed on at least one thing. Neither, for its own reasons, appears to desire the protection for civilians or combatants of Protocol I. Were an international tribunal to hear a dispute between the parties about the binding force of Protocol I, it would be faced with contentions from each side that neither desired its application. I have not found a case in which a rule or alleged rule of customary international law has been applied in these circumstances. There is hardly likely to be such a case, since customary international law rests on a foundation of consensuality. For that proposition reference may be made to Oppenheim's *International Law* 8th ed. vol 1 at 15-18, and to the work by *Van Hoof*, which I have already cited, at 97. [...]

I have not been persuaded by the arguments which I have heard on behalf on the accused that the assessment of Professor Dugard, writing in the *Annual Survey of South African Law* (1983) at 66, that 'it is argued with growing conviction that under contemporary international law members of SWAPO and the ANC are members of liberation movements entitled to prisoner-of-war status, in terms of a new customary rule

spawned by the 1977 Protocols', is correct. On what I have heard in argument I disagree with his assessment that there is growing support for the view that the Protocols reflect a new rule of customary international law. No writer has been cited who supports this proposition. Here and there someone says that it may one day come about. I am not sure that the provisions relating to the field of application of Protocol I are capable of ever becoming a rule of customary international law, but I need not decide that point today.

For the reasons which I have given I have concluded that the provisions of Protocol I have not been accepted in customary international law. They accordingly form no part of South African law. [...]

In the result, the preliminary point is dismissed. The trial must proceed.

Discussion

1. a. Which roles does IHL assign to the Protecting Power?
   b. Which purpose is served by notifying the Protecting Power of trials or sentences of prisoners of war? (GC III, Arts 104 and 107)
   c. What may the results be if a court of a Detaining Power fails to notify the Protecting Power of the trial of a prisoner of war? Does the court then have no jurisdiction to try him, as the defendant here argues? Or is it that the trial could not proceed without such notice? Is the issue of notification thus a jurisdictional or a procedural issue? (GC III, Arts 104; P I, Art. 45)
2. a. If Protocol I had been binding for South Africa, why does the Court nevertheless state that, even in that case, failure to give effect to its provisions only "might amount to an irregularity"?
   b. Under which condition could the defendant invoke Protocol I although at the time South Africa had not become party to it? If Protocol I was applicable, what would the consequences be for the defendant? Could the trial take place? Would he have combatant status? Could the Court decide upon this question? If he did have combatant status, could he be punished for acts of terrorism? Could he be punished for having killed South African soldiers? Is it necessary for attaining or maintaining prisoner-of-war status that he must not have attacked civilian targets, as the Court asserts? (P I, Arts. 44 and 45)
   c. Even if Protocol I is binding for South Africa as customary law, must not both parties to the conflict be bound by Protocol I for it to be applicable? Is the ANC a party to the Protocol? Is it bound by customary law? If Art. 1(4) of Protocol I is customary law, does the ANC have to formally declare its intention to respect and apply the Geneva Conventions and the Protocols in conformity with Art. 96 of Protocol I? If Art. 1(4) of Protocol I is customary law, is customary IHL of international armed conflicts applicable in the conflict between the government of South Africa and the ANC even though neither desired its application?
3. a. Has there to be first *usus* and later *opinio juris* to form a customary rule? Or can both elements appear simultaneously? Are there certain material sources which show *usus* and others *opinio juris* ? Or do all show simultaneously *usus* and *opinio juris* ?
   b. Is customary law based on the acceptance of States or on their opinion? Does the answer to that question matter? Can you think of a rule which would be either customary or not, depending on the answer to this question?
   c. Can customary IHL also be derived from State acts such as diplomatic statements, undertakings

and declarations? Are the latter *usus* ? Can only acts or also words show *usus*? Do claims necessarily conflict, or can they also show agreement on a norm? If declarations also count as practice, must they refer to an actual situation, or can they also be abstract statements about (i.e. in favour of) the rule? Can a rule become customary on the basis of statements alone? What if the actual behaviour of belligerents is incompatible with those abstract statements?

d. Do UN General Assembly resolutions constitute State practice? Do repeated announcements only "at best develop the custom and usage of making such pronouncements"? What about, for instance, the prohibition of torture? Is there no customary law against committing torture because some States practice torture? Yet what explains the fact that most of those States deny committing acts of torture? Do such denials not constitute a concrete act of which the Court speaks? Would D'Amato agree?
e. Is ratification of Protocol I (together with the practice of other States) an instance of State practice able to make all its provisions customary? Is non-ratification of a treaty strong evidence of its non-acceptance? Does non-ratification indicate non-acceptance of all rules contained in the treaty, or perhaps only of some of them? Thus, does non-ratification of Protocol I automatically mean that Art. 1(4) of Protocol I in particular is not customary law?
f. Once a rule has been included in a multilateral treaty, is the question whether it is customary only relevant for non-Parties? Has only their practice to be considered whenever evaluating whether it is customary? What would this mean for rules laid down in a treaty as widely accepted as the Geneva Conventions?
g. Does the fact that when Protocol I was concluded in 1977 the category of "racist regimes" listed in Art. 1(4) was limited to very few countries, one of them being South Africa, make it impossible to determine the general usage necessary for establishing the article as customary law? If so, because those States chose not to be bound by the Protocol? Even if almost all other States considered Protocol I applicable to such a situation? If a situation rarely arises or arises in only a few States, can rules regulating that situation never become customary international law? Is the position of the Court on this question connected to its theory on what counts as *usus* ?
h. Can a rule of IHL become customary even if South Africa objects to it? Must a rule of customary IHL be applied by South African courts although South Africa has never accepted that rule? Even though South Africa was against that rule as a treaty rule in Protocol I? Even though South Africa has persistently objected to that rule?
i. Are none of the principles reflected in Protocol I customary law and, as such, binding on South Africa? Under the customary law of 1987, did the law of international armed conflict apply to national liberation wars? Does it apply under today's customary law, taking into account that South Africa became a State party to Protocol I in 1995? How could a rule like Art. 1(4) of Protocol I become customary?

4. Do you agree with the criticism that Art. 1(4) of Protocol I introduced political objectives into humanitarian law? Does Art. 1(4) of Protocol I introduce anything at all, i.e., is it an innovative development in the law of war, or is it merely a reflection of existing international law? Does Art. 1(4) lead to a situation where both sides in an armed conflict are not equal under IHL? Does Art. 1(4) violate the separation between *jus in bello* and *jus ad bellum*? [See United States, President Rejects Protocol I]
5. What is the place of international customary law within your national law? Within South African national law at the time of the case? Must customary law be universally recognized before it may or must be

incorporated into your national law?